



REPUBLIC OF KENYA



**Republic v Bakari (Criminal Case 52 of 2018)
[2024] KEHC 544 (KLR) (25 January 2024) (Judgment)**

Neutral citation: [2024] KEHC 544 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
CRIMINAL CASE 52 OF 2018**

**A. ONG'INJO, J
JANUARY 25, 2024**

BETWEEN

REPUBLIC PROSECUTOR

AND

HAMISI NZIMO BAKARI ACCUSED

JUDGMENT

Introduction

1. The accused Hamisi Nzimo Bakari faces a charge of murder contrary to Section 203 as read together with Section 204 of the Penal Code.
2. Particulars of the offence are that on 20th day of October 2018 at Uwanja wa Ndege in Busa Sub-location, Vigurungani location, Kinango Sub-county within Kwale County, murdered Safu Bonaya.
3. The prosecution called 13 witnesses to support its case that the accused person committed the offence herein and he was placed on his defence.

Prosecution Case

4. PW1, Saumu Muthini Mulengye, said that on 21.10.2018 at 6.00 am while on a motorbike to go look for vegetables, she saw a woman lying beside the road. That they stopped and they went to where she was and that PW1 knew the woman and that she was her neighbour and her name was Celina. PW1 said that foam was coming out of her mouth and blood was oozing from her eyes and nose. That she was groaning and had an injury on the right side of her head. That the woman's skirt had been pulled up and she saw a blood stained stone at the scene beside her body. PW1 said that a yellow blouse was on her upper body and that the skirt and blouse were blood stained. That Celina could not talk although they had been together the previous evening before she was found injure.



5. PW1 informed court that she went to the village elder's house to make a report then went back to the scene. That a crowd had gathered at the scene and the woman was lying down facing up and still alive. That PW1 then went to look for vegetables and on her way back she found the injured woman still at the scene. That the village elder went to PW1's house and asked for a sack to make a shade for her against the strong sunlight. That they also went with water and cleaned her head but blood was still oozing from her head and eyes. That the village elder called the police and the following day at 7.00 am, PW1 came across a police vehicle that had collected the injured woman's body from the scene.
6. PW1 testified that she was present when the accused person whom she identified at the dock was arrested. That the village elder called the accused person who was then ordered to sit down until the arrival of the police. That PW1 knew the accused person as Mzee Debwe which was a nickname and that he was her customer. That later the police went to record a statement at her house.
7. PW2, Omari Guni Rumba, the chairman of Nyumba Kumi said that on 21.10.2018 at 6.00 am, he was at home and Mama Saumu (PW1) who is his neighbour went and reported to him that a woman had fallen by the roadside. That PW2 in the company of Kiboko, Makau, Thoya and PW1 went to the scene and saw a woman lying beside the road. That the woman was facing upwards and had an injury on her head. That there was a blood stained stone at the scene which had injured the woman and had also hit a tree which was at the scene. That she also had stab marks on the side of her left eye and was bleeding from her nose and mouth. That she also had another injury on the right side of her head.
8. PW2 further informed court that he knew the injured woman as Mama Fatuma, she was a neighbour and married to Dan Mwembe. That they found her alive but she could not talk. That they sent some people to the DO's office in Kuranze to report to police officers and an Administration Police officer went to the scene. That they started investigating the case and wondered why some men had not gone to the scene yet there were a few men in the neighbourhood. That when the accused whom they knew as Debwe Mwachupa Mkala whom PW2 identified in the dock went to the scene at 9.30 am, he said he was hungry and asked to be allowed to go and buy flour. That he said if he left without permission, he would be suspected and that PW2 allowed him to go. That after some time, he returned and said that he was doing some work at Mama Kanini and wanted to go and finish the work and he left.
9. PW2 said that they met as villagers to contribute some money to take the injured woman to hospital and that the accused contributed Kshs. 10 and left for his home. That the accused took an axe and a panga and returned to the meeting at 7.00 pm and that he then said that he wanted to go to the place he was burning charcoal. That neighbours became suspicious because he was restless. That they went to look for him and found him praying. That members of the public arrested him and took him to the scene of the incident, and that his house was about 40 meters away from the scene and the accused person used to live alone. PW2 stated that at the scene, there were footsteps heading to the accused person's house made by akala shoes.
10. PW2 testified that the OCS Vigurungani Police Station went to the scene the following morning and the accused was interrogated and he led them to his house and pulled a carton box and in it he removed a 3-inch nail which he had used to stab the deceased's left eye, and that the nail was taken by the police. PW2 said that he went to Vigurungani Police Station to record a statement and that the police took her to hospital but she died after 3 days.
11. PW3, Golo Chatiki, informed court that the deceased is his mother and that on 21.10.2018 at 9.30 am, he was at his place of work when he got a report from his in-law Hassan Borusu Tsimba that his mother had been injured. That he told him his mother was in Kiwanjani near Mpakani which is far from home. That PW3 proceeded to where his mother was and found his mother lying down. That she had injuries on the head and the right eye punctured with a nail. That there was a big stone where she lay, she was



- unable to speak and that her condition was bad. That he called the police who went to the scene the next day and that they later took his mother to Kinango Hospital then to Msambweni Hospital. That his mother died the next day after they arrived at Msambweni Hospital. That he identified the body, postmortem was done and thereafter he took the body for burial. PW3 said that he knew the accused on the day he was arrested.
12. PW4, Agaya Kambi Guya, said that the deceased was her mother and that on 21.10.2018 she received a call from her cousin Mwanahamisi who used to stay with her mother and that she told her that her mother had been hit with a stone and was in a critical condition. That she went and informed her husband and her brother who went to the scene and that her husband called and confirmed that her mother was in a critical condition and could not be carried on a motorbike. PW4 said that her mother had injuries on the head, her eye had been pierced and she was not talking. She said that her mother had a yellow and green dera which was torn and thrown and that they changed her into clothes that were in court.
 13. PW4 informed court that a police vehicle carried her mother to Vigurungani Police Station where witnesses alighted and they proceeded to Kinango Hospital but on the way they met an ambulance which took over and carried their mother to Kinango Hospital where she was admitted. She said that an X-ray was done at Kinango and at 6.00 pm, her mother was again transferred to Msambweni Hospital where they wanted Kshs. 6000 for an operation. That her brother went home on Tuesday to look for money but her mother died on 25.10.2018 on Thursday at around 6.00 pm and the body was taken to the mortuary for preservation and later taken home for preservation. PW4 said that the accused was known to her as he used to burn and sell charcoal in Limang'ombe but she had never seen him with her mother.
 14. PW5, Hassan Boru Tsimba, testified that on 21.10.2018 at 9.00 am, he was on the road to Mackinon when Agaya Kambi Guyo called and told him to go back home because his mother had been beaten in Uwanja and was in a critical condition. That when he arrived home, he accompanied Kambi to the scene which was 5 hours away. That they arrived at the scene at 3.00 pm where they found a group of people and the village elder. That the deceased was lying on the ground and one eye was pierced, she was bleeding and there was a stone nearby. That PW5's brother-in-law said they should put the deceased in a better place as she was in the sun and that they took her to the Chairman's house nearby. That a suspect known as Debwe who burnt and sold charcoal in Uwanjani and who had previously quarreled with the deceased had been arrested. That members of the public wanted to lynch him but PW5 restrained them until the police arrived at 6.00 am and interrogated the suspect.
 15. PW6, Justin Mwakoi Mwachala, the Village Elder of Kuranze village informed court that on 21.10.2018 at 8.00 pm, Rumba and Mwakamsha visited him and told him that there was a woman who had been raped, her eye pierced and she was unconscious in Kiwanja area. That he proceeded to the scene which was 15 kilometers away. That on arrival they found a group of infuriated villagers who wanted to lynch the accused. That the officers rescued the accused and locked him in a house. That PW6 went and saw that the woman was lying facing upwards and her eye was pierced and there was an injury on the head. That there was a stone nearby and used condom.
 16. PW6 said that he called the OCS Vigurungani Police Station and that the OCS arrived before dawn the next morning and took the woman and the suspect. That the suspect was interrogated by the OCS in the presence of PW6 and he led then to his house about 200 meters away and produced a nail from a carton box. That the suspect said he used the nail to pierce the deceased's eye and that the OCS took the nail. That the woman was taken to hospital while PW6, Mwakamsha, Rumba and others went to the police station to record their statements. That there was Mwanahamisi and the woman's relatives who accompanied them to the station.



17. PW7, Iha Thoya, said that the deceased was her neighbour in Uwanjani and that on 21.10.2018 in the morning, Saumu who is his neighbour went and told him that she found a woman who was injured. That they went to the scene in the company of Mzee Rumba where they found the woman beside the road and that PW7 found it was Mwembe's wife. That the head had injuries and she was bleeding from the eye. That they went to call Mwembe and after that they took Mwembe to the police station in Kuranze where he was interrogated and they returned home. That on return to Uwanja, they started investigations and found Bakari who on interrogation told them not to kill him. That Bakari was suspected because as they were busy with the woman, Bakari did not bother. That he was in his house just doing his work and the incident took place very close to his house. That Bakari said he was with Charo when they committed the offence and that Bakari and Charo were arrested and detained in a house.
18. PW7 testified that he went and informed the police at Kuranze and that he also informed the village Chairman who accompanied him to the station where he explained what had happened and they went back to Uwanjani with 2 officers. That the next morning, officers from Vigurungani went to Uwanjani and rearrested Hamisi and Charo. That at the scene, they found a stone, condom and clothes. That the woman was bleeding from the eye and the accused led the police to his house where he produced a nail he used to pierce the woman's eye. That the nail was removed from a box in Hamisi's house. That the victim together with the accused and witnesses went to the police station where they alighted except the victim who was taken to hospital. PW7 said he had lived in Uwanjani for 7 years but he was not privy to any relationship between the accused and the deceased.
19. PW8, Zakayo Kiboko Nginyi, a resident in Kiwanjani said that on 21.10.2018, at 7.30 am, he was going to Kiwanjani when he saw a group of people and that when he approached, he saw Mzee Thoya, Rumba and Saumu. He said that the deceased was his mother-in-law and that he saw she was lying facing upwards and he was bleeding and groaning. That he then went to the police station to record his statement.
20. PW9, No. 218313 P.C. Francis Katana, attached at Kinango Police Station said that on 21.10.2018, they were at Kuranze Police Post when the Chairman-Mwembe went and reported that there was a woman who had been injured and she was in a critical condition. That they went Uwanja where they found a small house and that members of the public had gathered and there was a woman lying beside the house. That she had her eyes closed and was not talking. That PW6 inquired what had happened and he was told the suspect had been apprehended and detained in the house. That the Chairman opened the house and inquired if the suspect committed the offence and he admitted. That members of the public wanted to beat the suspect and they guarded him as the Chairman went to look for network to communicate with the OCS Kinango.
21. PW9 testified that at 6.00 am, the OCS Kinango went to the scene and confirmed the injuries on the victim and the suspect was interrogated and that he admitted to having committed the offence. That the suspect led the police to the scene where they found some clothes, stone and a used condom. That photographs of the scene were taken and the suspect led the police to his house. That the OCS asked the suspect where the nail that he had used to pierce the victim's eye was and that he went and removed it from the roof of his house. PW9 informed court that the suspect was led back to the vehicle and together with the victim carried to the station. A stone, condom and clothes were taken by the OCS as exhibits.
22. PW10, Dr. Ahmed Mkuche Juma Hassan, testified that he attended to the deceased as an in-patient together with Dr. Riziki, Doctor Mjimba and a Clinical Officer at Kinango Hospital. He said that the deceased was taken to hospital on 12.10.2018 with history of assault by a person known to her.



- He said that the patient had injuries on the right side of the head which was swollen that the eye was also swollen and could not open, the head had severe injuries and the patient was unconscious. From Kinango she was referred to Msambweni for ICU and CT scan. He produced the referral letter. He said that he did not examine the patient's genitals to confirm if she was raped.
23. PW11, Irene Furaha Mwaringa, the Government Analyst received used condoms, stained nail, buccal swab of the accused and finger nail of the deceased in which she was required to analyse or examine and establish if the DNA profile of the suspect matched the DNA profile generated from the used condoms and whether the nail would match with the DNA profile of the deceased's fingernails. The used condom generated mixed male DNA profile that matched the DNA profile generated from reference sample of Hamisi Dzimo Bakari. PW11 said in re-examination that the mixed DNA profile generated from the used condom is an indication that there was another person who also used the same condom.
 24. PW12, Dr. Njau Mungai, testified that he was at Kinango Hospital when on 19.11.2018 the body of the deceased herein was exhumed and he conducted postmortem at the field. He found evidence of perforated cornea of both eyes, hematoma below the trachea and trachea cartilages, there was clotted blood on the temporal and parietal region of the head. He formed the opinion that death was caused by blunt trauma secondary to assault.
 25. PW13, PC Zeddy Kibor testified on behalf of PC Daniel Mwangi the Investigating Officer who was away on training. He produced the exhibits that were recovered from the scene by PC Mwangi.

Defence Case

26. The accused when placed on his defence gave sworn evidence and said that he did not know the deceased but knew Mwembe Dan the husband to the deceased because they had a common employer who employed them to burn charcoal in different locations. He said that he had a kiosk where he used to sell sugar, flour and petrol for motorbikes. He said he used to get his goods from Tanzania. He said that his relationship between him and his business people became sour because he was selling at different prices from them. He said that the village elder was sent to warn him because he was selling his goods at a competitive price and he stopped doing business altogether.
27. He testified that on 21.10.2018 at 6.30 am, he heard Mama Saumu raise alarm and say Mama ameuawa. That he and 2 other men together with Mama Saumu and 2 other women went to the scene of the murder in the company of the village elder. The accused person said that he was told to donate 2 litres of petrol so that some people could go and report to the Member of Parliament of what had happened and the Village Elder asked him to give him one litre of fuel so that a rider could go to Tanzania and make a phone call to the relative of the deceased. That he was also told to donate sugar so that those who were keeping vigil could take breakfast.
28. The accused person further said that on the material day he left shortly to go and pay a date that he owed and then return to the camp at about mid-day and at 2.30, he went to get Kshs. 1,000 from a woman at the market who owed him. That when he returned to the camp and told Nyumba Kumi that he wanted to be paid for the sugar and petrol, the elder told him that he was more concerned with money yet people were more concerned with the murder of the deceased. That when he went to check on his charcoal at 3.30 pm, members of the public followed and found that he was praying and they told him that they were suspecting him because he did not appear to be concerned with the murder of the deceased. That he was beaten and led back to the camp and he denied having committed the offence and said that if he committed the offence he would have escaped. He said that due to the beatings and threats to burn him using petrol from his house, he decided to save his life by admitting that he



committed the offence as he was also hypertensive. He said that the OCS at Kinango was present when he was forced to go and show the nail that he had used to stab the deceased and he produced a carton box that he had kept nails after constructing a door and six rusty nails were recovered.

29. At the close of the defence case, submissions were filed by Ms. Nabwana Advocate for the accused.

Submissions by the Accused

30. The defence submitted that no DNA profile was generated from the clothes recovered from the body of the deceased that could be linked to the accused person and that the stone that was recovered near the deceased was described by the witnesses in a conflicting manner. It was also submitted that the nail that was allegedly given to the police by the accused was not properly marked and was not entered in the inventory. It was further submitted that the accused person was apprehensive that the mob would harm him and therefore his state of mind at the time he alleged that he was made to confess was questionable.
31. It was further said that the DNA analysis on the used condom gave inconclusive results as to traces of the male DNA and did not have a link to the accused person. That the nail that was also taken from the accused person's house did not have DNA linking it to the deceased or the accused person.
32. The defence argued that the prosecution had failed to establish a nexus beyond reasonable doubt showing that the accused is responsible for the death of the deceased. The court was urged to acquit the accused person as the circumstantial evidence adduced by the prosecution was so weak that it does not firmly connect the accused to the deceased or even to circumstances surrounding her death. The defence also said that the prosecution had failed to prove malice aforethought and also failed to place the accused at the scene of the crime.

Analysis and Determination

33. In consideration of the evidence of 13 prosecution witnesses and in consideration of the defence witness' sworn statement, this court is to determine whether the ingredients of the offence of murder as provided for under Section 203 of the Penal Code Chapter 63 of the Laws of Kenya have been proved beyond reasonable doubt by the prosecution.
34. Section 203 of the Penal Code Chapter 63 of the Laws of Kenya under which the accused persons were charged provides as follows: -
- 'Any person who of malice aforethought causes death of another person by an unlawful act or omission is guilty of murder.'
35. The said provision creates elements of the offence of murder that must be proved by the prosecution beyond reasonable doubt as held in the case of Anthony Ndegwa Ngari v Republic [2014] eKLR to include: -
- i. That the deceased died;
 - ii. That the death was caused by an unlawful act or omission;
 - iii. That the accused person directly or indirectly participated in the commission of the alleged offence; and
 - iv. That there was malice aforethought.

Death of the deceased

36. There is no dispute as to the death of Safu Bonaya.



Death was caused by an unlawful act or omission

37. PW10, Dr. Ahmed Mkuche Juma Hassan said that when the deceased Safu Bonaya was taken to Kinango Hospital, she was unconscious and she had history of assault by a person known to her. She had severe injuries on the right side of the head which was swollen. Her eyes were also swollen and closed and she was referred to Msambweni County Hospital for ICU and CT scan.
38. PW12, Dr. Njau Mungai examined the body upon exhumation on 19.11.2018 and found that there was external bruising by the mid neck and both corneas were perforated. He said that there was hematoma below the trachea and trachea cartilages meaning there was injury below the neck area. He concluded that death was due to blunt trauma secondary to assault.
39. It is apparent that the deceased died as a result of an unlawful act. The injuries were not self-inflicted and they were not accidental.

Participation of the accused in the commission of the alleged offence

40. There was no eye witness to the murder of the deceased and the evidence tendered by the prosecution witnesses is purely circumstantial.

Before circumstantial evidence can form the basis of a conviction, it must satisfy several conditions, which are designed to ensure that it unerringly points to the accused person, and to no other person, as the perpetrator of the offence. In *Abanga alias Onyango v Republic*, Cr. App No. 32 of 1990 the Court of Appeal set out the conditions as follows:

“It is settled law that when a case rests entirely on circumstantial evidence, such evidence must satisfy three tests:

- i. the circumstances from which an inference of guilt is sought to be drawn, must be cogently and firmly established;
 - ii. those circumstances should be of a definite tendency unerringly pointing towards guilt of the accused;
 - (iii) the circumstances taken cumulatively, should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else.”
41. When the deceased was found by PW1 lying unconscious beside the road with her skirt pulled up and bleeding from the head and eyes, it was suspected that she had been raped as there was a used condom recovered at the scene. Although the accused said that he was one of those who went to the scene with PW1 and Chairman of Nyumba Kumi, PW2 said that he was with PW1 and 2 other people when they went to the scene.
 42. PW2 said that the restlessness of the accused person made them suspect that he was involved in the commission of the offence as he was not concerned that a resident of their village had died and yet his house was only 40 meters away from the scene of the crime. He also said that footprints from the scene led them to the accused person’s house. That when the accused person was arrested, he led the OCS of Vigurungani to his house and he produced a nail that had been used to stab the deceased person’s eye.
 43. The accused person claimed that she did not know the deceased person’s name and yet PW2 said that the deceased was a wife to Dan Mwembe, the uncle to the accused person. PW2 also said the deceased



had an affair with the accused person herein. He also said that the nail that the accused produced as having been used to perforate the eyes of the deceased had blood stains.

44. PW5, the son-in-law to the deceased said that there was a time the accused and the deceased had quarreled and that the accused person said that he was the one who committed the offence.
45. PW6, the Village Elder of Kuranze, went to the scene with two Administration Police Officers and rescued the accused person and locked him in a house as infuriated members of the public wanted to kill the accused for having committed the offence. When the OCS interrogated the accused in the presence of PW6, he led them to his house and produced a nail that he said he had used to pierce the eye of the deceased.
46. PW7 said that initially it was the deceased person's husband, Mwembe, who was arrested, interrogated and released. That further investigations led to the arrest of the accused who on further interrogation said that he should not be killed. That the accused also told them that he was with Bakari and Charo when they committed the offence.
47. PW9, PC Francis Katana also heard the accused admit that he committed the offence. PW9 was also present when the accused led the police to his house when he produced the nail that he used to pierce the deceased person's eye.
48. Among the exhibits recovered at the scene was a used condom which was forwarded for analysis at the Government Chemist at Mombasa and it generated a mixed male DNA profile that matched the DNA profile generated by the reference sample by the accused person.
49. From the evidence of the Government Analyst, and the evidence by PW6, PW7 and PW9 that the accused told them that he had committed the murder and produced a nail that he used to perforate the eye of the deceased, this court believes the prosecution's evidence that the accused person was the one who committed the unlawful act that led to the death of the deceased.

Malice aforethought

50. Section 206 of the Penal Code defines malice aforethought as follows: -

“Malice aforethought shall be deemed to be established by evidence proving anyone or more of the following circumstances: -

- (a) an intention to cause the death of or to do grievous harm to any person, whether that person is the person actually killed or not;
- (b) knowledge that the act or omission causing death will probably cause the death or grievous harm to some person, whether that person is the person actually killed or not, although such knowledge is accompanied by indifference whether death or grievous bodily harm is caused or not, or by a wish that it may not be caused;
- (c) an intent to commit a felony;
- (d) an intention by act or omission to facilitate the flight or escape from custody of any person who has committed or attempted to commit a felony”.



51. In the case of Isaac Kimathi Kanuachobi -vs- R (2013) eKLR it was held: -

“There is express, implied and constructive malice. Express malice is proved when it is shown that an accused person intended to kill while implied malice is established when it is shown that he intended to cause grievous bodily harm. When it is proved that an accused killed in further course of a felony (for example rape, a robbery or when resisting or preventing lawful arrest) even though there was no intention to kill or cause grievous bodily harm, he is said to have had constructive malice aforethought.”

52. The elements to prove malice aforethought were settled in the case of Ernest Asami Bwire Abanga alias Onyango v R (CACRA No. 32 of 1990) where the Court held:

“the question of intention can be inferred from the true consequences of the unlawful acts or omission of the brutal killing, which was well planned and calculated to kill or to do grievous harm upon the deceased.”

53. The perforation of the deceased person’s eye, the severe head injuries and the hematoma before the trachea and the trachea cartilages is evidence of the assailant’s intention to immobilize and/or inflict fatal injuries on the deceased. Evidence of mens rea has been proved by the prosecution beyond reasonable doubt. The precision with which the offence was planned and committed is proof of the extent of malice on the part of the perpetrators.

54. In conclusion, this court find that the prosecution has proved its case beyond reasonable doubt. The accused person is found guilty of the offence of murder and convicted accordingly pursuant to Section 322 (1) of the Criminal Procedure Code.

**DATED, SIGNED AND DELIVERED IN OPEN COURT/ONLINE THROUGH MS TEAMS, THIS
25TH DAY OF JANUARY 2024**

HON. LADY JUSTICE A. ONG’INJO

JUDGE

In the presence of: -

Etropia - Court Assistant

Mr. Ngiri for the State

Ms. Nabwana Advocate for the Accused

Accused person present in person

HON. LADY JUSTICE A. ONG’INJO

JUDGE

Mr. Ngiri: I do not have previous records for the accused.

Mr. Nabwana Advocate: I pray that we be given a date for mitigation.

Order: Mention on 15.2.2024 for Victim Impact Statement, mitigation and sentence. Copy of judgment to be supplied.

HON. LADY JUSTICE A. ONG’INJO

JUDGE



25. 1.2024

